

BEFORE THE MONTGOMERY COUNTY COMMISSION
ON COMMON OWNERSHIP COMMUNITIES

IN THE MATTER OF:

POTOMAC GROVE HOME OWNERS
ASSOCIATION, INC.

:
:
:

Complainant

:

v.

: Case No.: 344-G
May 31, 1997

HOWARD SACHS AND
DEBRA CAPLAN

:
:

Respondent

:

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on FEBRUARY 26, 1997 pursuant to 10(B)-5(i), 10(B)-11(e) and 10(B)-13(a) of the Montgomery County Code 1994, as amended, and the duly appointed Hearing Panel having considered the testimony and evidence of record, finds, determines, and orders as follows:

BACKGROUND

AS more fully set forth on page (101) of Commission EXHIBIT 1, Complainant filed a formal dispute with the Office of Common Ownership Communities ("Commission") alleging the Respondents over a four year period failed to maintain properly a portion of their property and complainant's now requests that the Respondents be ordered to maintain the property or, in the alternative, that Complainant be permitted to maintain the

property at the Respondent's expense. Respondents assert that a fence that had been installed on the property prior to their purchase of the property prevented them from maintaining the area outside of the fence and that they had no permission from Complainant to move or relocate the fence. Further, they allege the property was difficult to maintain because of rocks and other items in the ground and that if the Complainant wanted the property to be kept up, the Complainant should incur the cost. Thus the Respondents believe it to be the Complainant's primary responsibility to maintain the property area in question at Complainant's expense.

The Complainant seeks: (1) an order affirming the right to enforce its covenants and by-laws which require the Respondents to maintain the entire property in question or (2) order authorizing it to enter onto the property at Respondents' expense to maintain the areas needing upkeep and maintenance.

A hearing on the matter was held on February 26, 1997 wherein the Complainant was represented by Jeffrey Van Grack, Esquire, and the Respondents were represented by themselves.

STATEMENT OF EVIDENCE IN THE RECORD

The following evidence was presented to the Hearing Panel in the form of oral testimony and documentary introduced by the parties:

1. When the Respondents home was constructed, and prior to the time Respondents acquired it, the subdivision builder constructed a fence across the rear yard of several properties, including the Respondents' whose rear property fronted along Route 28 in Montgomery County. The fence was built because homeowners expressed safety concerns for family and children because of the extreme slope of a hill on the rear property leading down to the area of the roadway of Route 28.

2. Seven photographs taken in July 1993 depicting the rear yards with the fence in question shown were received into evidence.

3. As part of the Commission's file introduced and accepted as evidence as Exhibit 1, on page 21 was a letter dated July 8, 1993 notifying the Respondents of need for maintenance to the rear yard area.

4. Other notices were received by Respondents regarding the lack of maintenance of the rear yard on June 14, 1994, June 29, 1994 and June 5, 1995.

5. Respondents offered evidence that the fence was already built on a part of the property when they moved in on or about March 29, 1993 and that it was a continuous fence that extended unbroken through the rear yards of several homeowners whose rear yards fronted on Route 28.

6. Testimony was received was that the adjacent homeowners maintained their properties outside of the fence.

7. Permission was given by the Association to construct the fence on or about December, 1, 1991 and the resulting construction has remained in the same location since that time in an unaltered condition.

8. The first president of the Association acknowledged that the area outside the fence after construction of the fence was never considered or treated by the Association as common area nor regularly maintained by the Association.

9. Other homeowners observed that the Respondents consistently maintained the area of their property in the front, facing Gravenstein, in an acceptable manner.

10. Each fence, including the fence at the rear of the property of the Respondents, has a gate to allow access to the area of the slope below the fence line.

11. There were occasions when the grass on the property in question outside the fence in the rear yard of the Respondents was cut and this occurred between the years 1993 and 1996. However, Complainant introduced evidence that the property was not maintained properly for the majority of the time in question.

12. Other owners were told that trees on the slope could not be removed without permission of the association nor could the fence be relocated. Complainant introduced evidence that Respondents could remove the subject fence at will, and

would be permitted to build a new fence but only with Complainants prior written approval.

13. Respondents did not testify on their own behalf.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the preponderance of the evidence, the testimony, the investigative file that was admitted as part of the record and arguments posed by the parties, the Commission makes the following Findings of Fact and Conclusions of Law:

1. During all pertinent times the Respondents were the legal property owners of the real property in question, that being the hill and slope below the fence in the rear of the Respondents' yard and which leads down to County right-of-ways that border Route 28.

2. Article VIII of the Declaration of Covenants, Conditions and Restrictions is a valid and enforceable provision and requires owners of property to keep their property in good order and repair and free from debris in a manner and with such frequency as is consistent with good property management.

3. The area in question outside the fence on the Respondent's rear property is not common area, Complainant has not taken any actions which would require the Complainant to maintain that property at its own cost or expense.

4. Since the rear yard and property of Respondents has a fence which Respondents' purchased with the property, Respondents have the choice of leaving the fence as built or removing the fence altogether. However, Respondents may not reconstruct this fence or other fence inconsistent with the Covenants or By-Laws of the Association which pertain to application, approval or construction of fences on property.

5. The Complainant has proved that the Respondents on more than one occasion have failed to comply with the Declaration of Covenants, Conditions and Restrictions to properly manage the upkeep and maintenance of their property.

6. The action of the Board, in its attempt to enforce the Covenants, Conditions and Restrictions, consistent with the by-laws of the Association, was an appropriate exercise of its business judgement given the facts that were presented to the Panel.

ORDER

In view of the foregoing and based upon the evidence of the record, it is hereby

ORDERED that:


1. Respondents must maintain their entire property consistent with the requirements of the Covenants, Conditions and Restrictions of the Potomac Grove Homeowners Association, and IT IS FURTHER

ORDERED that:

2. The Respondents, upon reasonable notice and opportunity for compliance of not less than twenty days following proof of receipt of any such notice, must bring their property into compliance with Article VIII Section 8.01 of the Covenants, Conditions and Restrictions of the Potomac Grove Homeowners Association, or be responsible to reimburse the Potomac Grove Homeowners Association for any reasonable expenses it incurs in performing the necessary labor and maintenance activity itself. As part of their compliance efforts, Respondents may remove their fence in its entirety.

3. The foregoing was concurred in by panel members Price, Simon, and Hickey.

4. Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days from the date of this Order, pursuant to Chapter 1100, Subtitle B. Maryland Rules Procedure.



William John Hickey,
Panel Chairman
Commission on Common
Ownership Communities